

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN SCOTT BELL and JOLENE BELL,

Plaintiffs-Appellants,

v

CALVERT'S ROLL-OFF CONTAINER
SERVICES, INC.,

Defendant-Appellee.

UNPUBLISHED

August 30, 2007

No. 266860

Livingston Circuit Court

LC No. 04-020894-NI

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Plaintiffs¹ appeal as of right from the trial court's order granting defendant's motion to dismiss. We affirm.

In this automotive negligence action, plaintiff alleged that he was parked at a light when the driver of defendant's semi-truck failed to obey the traffic signal and rear ended the vehicle in which plaintiff was traveling. Plaintiff asserted that the impact caused him serious injury, including but not limited to neck and spine pain and a closed head injury. As a result of the brain injury, plaintiff alleged that he suffered from black out spells, headaches, nausea, and other symptoms. Despite the fact that plaintiff alleged that he suffered from serious and permanent brain injuries, he did not complete medical testing as ordered by his treating physicians. On September 10 to September 12, 2003, plaintiff was to submit to a 72-hour ambulatory EEG,² but plaintiff discontinued the testing after forty-eight hours by disconnecting the equipment. The technician administering the test reported that there was poor patient compliance and the patient failed to submit requested log sheets. Thus, in the medical report submitted to plaintiff's physician, the reports of loss of consciousness could not be substantiated because the EEG did not demonstrate any abnormal electrical activity before the test was stopped by plaintiff.

¹ Plaintiff Kevin Scott Bell filed this litigation as a result of injuries allegedly incurred as a result of an automobile collision involving a representative of defendant. The loss of consortium claim raised by Jolene Bell, plaintiff Kevin Bell's wife, is strictly derivative in nature. Therefore, the singular "plaintiff" will refer to Kevin Scott Bell only.

² "An electroencephalogram (EEG) is a test that measures and records the electrical activity of your brain." See <http://www.webmd.com/epilepsy/Electroencephalogram-EEG21508>.

Because of the inconclusiveness of the EEG testing, it was recommended that plaintiff submit to in-patient epilepsy monitoring to further evaluate the reports of loss of consciousness.

Aware of the fact that plaintiff had not completed testing with his own physician and that plaintiff's insurer was unable to schedule and complete the 72-hour EEG testing, defendant obtained a stipulated order to compel plaintiff's attendance at an independent medical examination and the 72-hour EEG monitoring. This order, entered on June 3, 2005, provided, in relevant part:

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff, Kevin Bell, shall attend an independent medical examination as well as an EEG monitoring.

IT IS FURTHER ORDERED AND ADJUDGED that if the Plaintiff fails to appear for the examination with Dr. Craig Watson on May 31, 2005, and/or for the 72-hour EEG monitoring at Harper University Hospital on June 1, 2005, through Friday, June 3, 2005, he will pay the cancellation and/or no show fees up to \$1,000.00 unless there is documented good cause for his inattendance.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant shall provide an 800 mileage allowance and a \$100.00 fee for lodging and meals.

Plaintiff did not appear for the tests governed by the stipulated discovery order. Consequently, defendant filed a motion to dismiss, or alternatively, a motion to compel plaintiff's attendance for the medical testing. In the pleading, defendant asserted that dismissal was warranted where plaintiff failed to complete the medical testing for his own physician, failed to complete testing for his automotive insurer, and failed to complete this testing as set forth in the discovery order. Although the court order required documented good cause for failing to appear, plaintiff's counsel only advised defendant that plaintiff was ill. There was no independent corroboration of the illness. Defendant asserted that plaintiff had a prior history of noncompliance as evidenced by his cancellation of his deposition on two occasions because of alleged transportation or medical issues. Defendant further asserted that the independent medical examiner, Dr. Watson, was no longer available because of plaintiff's cancellation. With regard to relief, defendant requested dismissal of the action, compelled attendance for the medical tests or dismissal if plaintiff failed to appear a second time, and costs and attorney fees as a sanction.

Plaintiff opposed the motion, asserting that illness prevented him from attending the scheduled medical testing, the testing had been re-scheduled, and plaintiff had "every intention of making it." After hearing the arguments of counsel, the trial court ruled that plaintiff would attend the re-scheduled testing and that the request for costs or sanctions would be deferred. When advised that defense counsel would submit an order, the trial court instructed the parties to submit a generic form order immediately. On July 7, 2005, the trial court entered the following handwritten order that provided in relevant part:

Defendant's motion to dismiss is denied. Plaintiff shall attend the IME set for 8/23/05 – 8/26/05. The issue of costs and [attorney] fees is taken under advisement. Discovery shall be extended to case evaluation.

On September 29, 2005, defendant filed a motion to dismiss, or in the alternative to strike allegations of seizures and blackouts raised in the complaint. In the pleadings, defendant reiterated the prior occasions wherein plaintiff was scheduled to complete the 72-hour EEG, but one had never been completed. Defendant obtained a letter from plaintiff's insurer, AAA, indicating that three attempts had been made to have plaintiff submit to an in-patient EEG/epilepsy evaluation, but plaintiff failed to show on all three occasions. With regard to the medical testing ordered by the trial court, plaintiff did appear for the testing on August 23, 2005. However, plaintiff prematurely ended the testing and left the facility before the testing could be completed. Therefore, it was asserted that dismissal, costs, and attorney fees were warranted under the circumstances. On October 27, 2005, defendant filed an amended motion to dismiss. Therein, defendant noted that plaintiff terminated the testing process after 65 hours and left the facility against medical advice. To corroborate the noncompliance, defendant submitted the medical report from the examiner, Dr. Aash Shah. In the report, Dr. Shah opined that the EEG was incomplete because plaintiff wanted to be discharged from the hospital to "go home early."

Plaintiff opposed the motion to dismiss, asserting that he was not in violation of any court order because he was merely required to "attend" the independent medical examination, and there was no requirement contained in the court order that he remain for 72 hours because "[t]hat would make no sense." Further, plaintiff asserted that he suffered from extensive pain due to headache and was advised by the nurse named "Kim" that he would be released that morning. A miscommunication did not constitute a willful violation that would warrant sanctions such as dismissal. Plaintiff asserted that he had complied with discovery and completed all necessary medical authorizations. Lastly, plaintiff asserted that there was no prejudice to defendant because Dr. Shah had completed a medical report indicating normal activity during the time period that the testing occurred. In support of the motion, plaintiff submitted an affidavit indicating that he suffered from pain and headaches during the testing, was told that he could leave early by a nurse, and needed to return home to his child who did not have a babysitter.

After hearing oral arguments from the parties, the trial court requested additional documentation substantiating defendant's assertion that plaintiff left the facility against medical advice and was never told that he could leave the facility early. Dr. Shah's affidavit opined that plaintiff "disconnected the EEG leads and left the hospital against medical advice" after 65 hours of monitoring. (Emphasis in original). Further, it was Dr. Shah's decision to terminate the testing or discharge plaintiff from the hospital, and no other employee had the authority to do so without Dr. Shah's express consent. Dr. Shah consulted the medical team, including the medical technician in the unit, and she denied any representation to plaintiff that he could leave the facility early. Defendant also submitted the affidavit of END Technologist Kimberly Harris who denied that she made any representations to plaintiff that he could leave the facility without being discharged by Dr. Shah.

After hearing the arguments of counsel, the trial court dismissed the action, ruling as follows:

This is a request to dismiss and/or to strike allegations of blackouts and seizures. This has been the subject of multiple orders entered by the Court, not only by myself, but Judge Burrell in my absence, requiring and compelling the Plaintiff to undergo the testing that was requested. There's no question that this stipulation indicated that it was a 72-hour test, that was discussed back at the time

the court got involved in June. It is now November. As draconian as it might be, based upon the affidavits that have been presented to this Court, I am going to enter an order for dismissal of the case in full based upon the Plaintiff's failure to comply with the multiple discovery orders that have been entered by this Court, and assess costs in the amount of \$1,000.00 against the Plaintiff as well.

Plaintiff appeals as of right from the trial court's order of dismissal with prejudice.

Trial courts possess the inherent authority to sanction litigants and their counsel for failing to abide by court orders and that authority includes the right to dismiss an action. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court's exercise of its inherent power to dismiss a case for failing to comply with the court's orders is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court selects an outcome outside the range of principled outcomes. *Id.* If the trial court selects a principled outcome, there is no abuse of discretion, and the reviewing court must defer to the trial court's ruling. *Id.* In light of the standard articulated by the *Maldonado* Court, we cannot conclude that an abuse of discretion occurred in this case, and we defer to the trial court's judgment.

In *Maldonado, supra*, the plaintiff filed a sexual harassment suit against her employer and her immediate supervisor. The trial court ruled that the supervisor's indecent exposure conviction was inadmissible, and the plaintiff's application for leave to appeal was denied. *Id.* at 377-378. Despite the ruling, the plaintiff and her attorneys took steps to publicize the supervisor's conviction in the media and at demonstrations shortly before trial was scheduled to commence. *Id.* at 378-385. After a two-day evidentiary hearing, the trial court dismissed the plaintiff's case, holding that the plaintiff and her counsel had deliberately engaged in premeditated misconduct that was designed to tamper with justice by prejudicing the jury pool, and no lesser sanction would deter the plaintiff or her counsel for engaging in the inappropriate, deliberate conduct. *Id.* at 386-387.

The Supreme Court affirmed the trial court's dismissal, concluding that it had the inherent authority to do so, holding:

[T]rial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

We further acknowledge that our trial courts also have express authority to direct and control the proceedings before them. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[I]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

In the instant case, we consider whether the trial court abused its discretion in dismissing plaintiff's case because plaintiff and her attorneys

repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice. We conclude that because the trial court possessed the inherent authority to dismiss the action, and because the trial court warned plaintiff and her counsel that dismissal would result if they continued to publicize evidence ruled inadmissible by court order, the trial court did not abuse its discretion in dismissing plaintiff's case. [*Maldonado, supra* at 376 (citations omitted).]

In the case at bar, the trial court had the inherent authority to act in a manner that was designed to manage the expeditious disposition of the case and control the proceedings before it. *Maldonado, supra*. Based on plaintiff's medical history, defendant learned that it would have difficulty discovering relevant medical information when plaintiff failed to submit or complete tests ordered by his own medical advisors or his insurance company. Consequently, defendant obtained a stipulated order to compel the medical tests to their completion with a monetary penalty for failing to comply without documented good cause. Although it was asserted that plaintiff was ill and therefore did not appear for the test as scheduled, there was no independent medical corroboration to support that assertion. Despite the clear language of the stipulated order, the trial court held the issue of a penalty in abeyance and ordered plaintiff to attend the medical tests. It is important to note that the trial court warned plaintiff that the case could be dismissed if he did not appear for the re-scheduled tests. Once again, plaintiff failed to complete the medical tests and left the facility against medical advice.

On appeal, plaintiff submits various reasons to reverse the dismissal, including: (a) a lack of history of noncompliance; (b) the second order did not contain the 72-hour time frame, but merely required plaintiff's "attendance";³ (c) the lack of prejudice to defendant; and (d) a willingness to stipulate that the entire 72-hour test would have rendered a normal result. However, plaintiff's rationale fails to address the trial court's dismissal as an exercise of its inherent authority when faced with a noncompliant plaintiff. Plaintiff was given the opportunity on multiple occasions prior to this action to complete the testing, but did not complete the testing of his own volition. Defendant's plea for dismissal or alternative relief was accompanied by requests to extend discovery and to adjourn the action to account for the yet to be completed IME and EEG. The trial court was presented with a party who had not complied with his own physician's medical order, his own insurance company's requests for medical testing, and the testing needed to defend this case. Because of the failure to engage in or complete discovery, the case was not being pursued or managed, and the trial court had the authority to render decisions designed to move the case forward. *Maldonado, supra*. Plaintiff did not complete the testing when given the second opportunity to comply by the trial court. It is important to note that the

³ We note that the trial court ordered that the testing would be completed. It was clearly the trial court's intention that the plaintiff would *attend and remain* at the facility until tests were completed at the end of 72 hours. The order did not contain the express "72 hour" provision because the trial court advised the parties to submit a generic order at that time despite defendant's representations that an order would be prepared and submitted. Plaintiff's argument in this regard is disingenuous at best.

trial court even contemplated ordering the testing to be completed near plaintiff's residence. However, other than subjective claims of pain, plaintiff did not submit medical information from his doctors regarding the impact of the testing on his health and the potential or need for pain management during the testing. Plaintiff did not propose a different site for the testing that may have furthered the tests completion. Under these circumstances, we cannot conclude that the trial court's decision to dismiss the case constituted an abuse of discretion. *Maldonado, supra*.⁴

Affirmed.

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello

⁴ Plaintiff argues on appeal that an evidentiary hearing is required to determine whether the affiant, Kimberly Harris, is the same individual that advised plaintiff that he could leave that morning. Plaintiff did not raise this issue in the trial court. A party may not harbor error as an appellate parachute. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005).